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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 660

TRAVELERS INDEMNITY COMPANY and C. W. SHAFFER,
Petitioners,

vs.

UNITED STATES OF AMERICA; JAMES K. LUDER, Individually and d/b/a Dorrance Grain Company, Dorrance, Kansas, and Luder Grain Company, Waldo, Kansas; Lester Pagett; Robert Pagett; R. E. Pagett; Richard Branda; Marvin L. Reynolds; Dale Beatty; Claude McKnight; Thomas Hutchinson; Everett Pruter; Kenneth Day; Robert Lord; Alma Roe; Iva Bradshaw; Harold Lund; Elvin Van Pelt and Murphy Brothers,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Travelers Indemnity Company and C. W. Shaffer, petitioners herein, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on October 28, 1959.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, Tenth Circuit, is unreported, but will be reported in 265 F.2d and is printed in Appendix A hereto, *infra*, pages A1 to A6.

Findings of fact and conclusions of law rendered by the United States District Court for the District of Kansas and entered on January 30, 1959, is printed in Appendix A hereto, *infra*, pages A7 to A22.

JURISDICTION.

The judgment and decision of the Circuit Court of Appeals was entered on October 28, 1959. The jurisdiction of the court is invoked under 28 U.S.C.A., Sec. 1254 (1), Sec. 2102 (c) and Rules 19 (b) and 22 (3) of the Civil Rules of Procedure of the Supreme Court of the United States.

Application for stay of proceedings was forwarded to the Circuit Court of Appeals, Tenth Circuit, on December 31, 1959, and order staying was issued on the 8th day of January, 1960, granting a stay until February 8, 1960, and if this petition be filed, thereafter until final disposition by the Supreme Court.

QUESTIONS PRESENTED.

1. The decision of the Circuit Court of Appeals, Tenth Circuit, is in conflict and contrary to the established law and public policy of the State of Kansas. Said decision, in effect, overrides and overrules the statutes and decisions of said state.

2. The finding by the Circuit Court of Appeals, Tenth Circuit, of a bailment relationship between farmer-producers and the warehouseman where the farmer-producers delivered said wheat to an unlicensed elevator operated by James K. Luder, which wheat was later transferred by Mr. Luder to his licensed elevator twenty-five miles distant, is in direct opposition to the established law and public policy of the State of Kansas in that said Kansas law permits wheat delivered to an unlicensed elevator to be delivered as a completed sale only and prohibits said wheat from being so delivered for the purpose of storage or transfer for the public and as such cannot create a bailment under said state law. In view of this, warehouse receipts issued on said wheat from the licensed warehouse are invalid receipts under said state law.

3. The delivering and storage of grain for the public in warehouses in Kansas is of such importance as to be affected with public interest. The statutes and decisions of the courts of said state require strict compliance. Under said law the farmer-producers and warehousemen are charged with knowledge of said law, which permits deliveries of grain to an unlicensed elevator to constitute a sale only so that any intent of the parties in contravention of said law and public policy is void. Any finding of the Circuit Court of Appeals, Tenth Circuit, indicating a relationship of principal and agent between said parties or otherwise is void and in contravention of said state law.

4. The bond of the petitioner, Travelers Indemnity Company, issued upon Mr. Luder's licensed warehouse at Dorrance, Kansas, upon which the petitioner, C. W. Shaffer, is indemnitor, is a statutory bond of the State of Kansas and any liability thereon is subject to the laws of the State of Kansas. The decision of the Circuit Court is in direct conflict to the established law and public policy

of the State of Kansas and inflicts more liability upon these petitioners than is required under Kansas law.

5. The Circuit Court of Appeals, Tenth Circuit, in its decision failed to apply the controlling law on the issues involved, that being the law of the State of Kansas.

STATUTES INVOLVED.

The pertinent Kansas statutes involved in this matter are as follows:

General Statutes of Kansas, 1949, 34-223.

"Definitions in part. In this act, unless the context or subject matter otherwise requires: 'Action' includes counterclaim, setoff, and suit in equity. 'Delivery' means voluntary transfer of possessions from one person to another. 'Fungible grain' means grain of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit. 'Grain' means wheat, corn, oats, barley, rye, soybeans, grain sorghums and any grains upon which federal grain standards are established; also seeds generally stored by warehouses, if special permission is granted by the chief grain inspector. 'Holder' of receipt means a person who has both actual possession of such receipt, and a right of property therein. 'Order' means an order by endorsement of the receipt. 'Owner' does not include mortgagee or pledgee. 'Person' includes individuals, corporations, partnerships, and all associations of two or more persons having a joint or common interest. 'To purchase' includes to take as mortgagee or pledgee. 'Receipt' means a warehouse receipt or receipts. 'Value' means any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof, or as security therefor. 'Public

warehouseman' means a person lawfully engaged in the business of storing grain for the public."

General Statutes of Kansas, 1949, 34-224.

"Public warehouses. The term public warehouse, as used in this act, shall be deemed to mean every elevator or other building on or adjacent to the property of any railroad in which grain is received for storage or transfer for the public."

General Statutes of Kansas, 1957 Supplement, 34-230.

"Inspection of warehouse; issuance of license, when; term; fee; posting; suspension, cancellation or revocation, when; notice and hearing; appeals; procedure. Upon receiving such application and bond, it shall be the duty of the director of the state grain inspection department to make an investigation and inspection of the warehouse or warehouses covered by such application, and if such warehouse or warehouses be found suitable for the proper storage of grain for which a license is applied for, and that such warehouseman agrees, as a condition to the granting of a license, to comply with and abide by all the terms of this act, and the rules and regulations prescribed thereunder, the director is authorized to issue to the applicant a license to operate either a local public warehouse or a terminal public warehouse, as the director shall deem proper. Every such license shall be dated, shall designate the kind of warehouse which it authorized to be operated, and shall expire one year from and after the date of its issuance, and shall designate the name of the licensee and the location of such warehouse: *Provided, however*, The director may, during the license period following the effective date of this act, issue licenses for periods longer than one year but not longer than two years, for the purpose of equitably distributing application dates of licensees throughout each calendar year following the initial period herein provided for, and for such license periods

of longer than one year he shall compute the license fee for that portion of such period beyond one year pro rata on a daily basis. So far as possible the director shall endeavor to avoid expiration of licenses during the months of June, July and August of any license year: *Provided further,* Any licensee making application under this section shall submit such application, together with prerequisite data and requirements of the department at least thirty (30) days prior to the date of expiration of his current license, and for each day less than said thirty (30) days the licensee shall be penalized an additional fee of three dollars ($3.00). Every such license shall be at all times during the operation of such bonded warehouse, posted in a conspicuous place in the office room of such warehouse. If the holder of any public warehouseman's license shall be convicted of any violation of the provisions of this act, or if said director shall determine that any holder has violated any of the penal provisions of this act or any of the rules and regulations adopted by the director under the provisions of this act, such director may at his discretion suspend or cancel and revoke the license of such holder * * *."

General Statutes of Kansas, 1949, 34-231.

"Failure to procure license or give bond; penalty. Any person who shall transact any public warehouse, without first procuring a license for such warehouse, as hereinbefore provided, or without having such license displayed in the office room of said warehouse, or who shall continue to transact any such business after such license has been revoked (save only that he be permitted to deliver property previously stored in such warehouse), shall upon conviction thereof be fined in any sum not less than $100, or not more than $500, for each and every day such business is carried on. And the chief inspector may refuse to renew any license or grant a new one to any person whose license has been revoked within one year from the time of such revocation."

General Statutes of Kansas, 1949, 34-246.

"Issuance and cancellation of receipts; division and consolidation. That no warehouse receipt shall be issued except upon actual delivery of grain into store in the warehouse from which it purports to be issued * * * "

STATEMENT OF CASE.

James K. Luder in 1957 owned and operated a duly licensed and bonded grain warehouse under the laws of the State of Kansas at Dorrance, Kansas, known as the Dorrance Grain Company. Also, he owned and operated an unlicensed, unbonded warehouse about twenty-five miles distant at Waldo, Kansas, known as Luder Grain Company.

In the fall of 1957, he failed to have sufficient grain on hand to satisfy his outstanding obligations. The United States, through Commodity Credit Corporation, was the owner of outstanding warehouse receipts issued to farmers from the licensed warehouse at Dorrance, Kansas, and assigned by the farmers to Commodity Credit Corporation.

The United States of America filed this action in the Federal District Court for the District of Kansas against Travelers Indemnity Company, the bonding company, its indemnitor, C. W. Shaffer, the petitioners, and all interested parties for a receivership and determination of the rights of all parties to the action. This action concerned wheat and a substantial amount of milo, but the parties involved in the milo are not concerned in this proceeding, it being confined to wheat.

It was found that sixteen different farmer-producers delivered a total of 6,612.95 bushels of wheat to the un-

licensed, unbonded warehouse, Luder Grain Company, at Waldo, Kansas. It was later transferred by Mr. Luder at his expense twenty-five miles to the licensed, bonded warehouse, Dorrance Grain Company, at Dorrance, Kansas, from which point warehouse receipts were then issued to the farmers and assigned to Commodity Credit Corporation on loans; that in addition, warehouse receipts not assigned to Commodity Credit Corporation are held by two producers in the total of 241.83 bushels. In addition thereto, certain farmer-producers are holding scale tickets from the unlicensed elevator in the amount of 2,669.73 bushels, all as shown in the District Court's Finding of Fact No. 3.

Before passing on other issues, the District Court felt it essential to determine the ownership of the above wheat and other grains. Following hearing, the District Court made findings of fact and conclusions of law adverse to these petitioners. Under the provisions of Title 28, U.S. C.A., Section 1292, the Circuit Court of Appeals, Tenth Circuit, allowed appeal from such interlocutory order with these petitioners appealing from the District Court's Finding of Fact No. 3 and Conclusion of Law No. 1, and thereafter rendered decision upholding the finding of the lower court, being adverse to these petitioners.

The United States, being an interested party, and the plaintiff, filed its original action in the Federal District Court wherein said court had jurisdiction of all parties to said action.

The principal controversy is whether under the laws of Kansas, as applied to the above facts, wheat delivered into the unlicensed elevator, Luder Grain Company, at Waldo, Kansas, constituted a sale of said wheat, with title passing to Mr. Luder, or whether a bailment was created.

REASONS FOR GRANTING THIS WRIT.

In support of the questions heretofore set out, petitioners contend that under the statutes heretofore set out and the decisions of the Supreme Court of Kansas, the delivery of grain to the unlicensed Waldo elevator, Luder Grain Company, constituted a completed sale of the grain to Mr. Luder with the result that the Circuit Court of Appeals, Tenth Circuit, erred in finding a bailment.

The landmark case in the State of Kansas, which is followed by all later cases, is *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P.2d 102:

> "Syllabus 1. Warehousemen—Rights and Liabilities—Statutory Requirements—Review. One who in this state operates a grain elevator on or adjacent to the property of a railroad, but who has not complied with the statute (Laws 1931, ch. 194) so as to become a public warehouseman within the meaning thereof, has no legal right, power or authority to receive grain for storage or transfer for the public; neither has he authority to issue warehouse receipts for grain which a grain grower claims to have stored with him, nor to issue scale tickets for such grain marked with the word 'storage' or some abbreviation thereof so as to make them tantamount to valid warehouse receipts.
>
> Syllabus 2. Sales—Construction and Effect—Distinguished from Bailment. The transaction described in the opinion between the grain grower and the operator of the elevator, under the law applicable thereto, is held to be a sale, not a bailment."

The cited case was an action for conversion of wheat alleged to be stored in the elevator, the manager of which sold it to a grain company, and jury trial resulted in judgment for plaintiff against grain company from which the grain company appealed.

The principal controversy between the parties is whether the transaction between the plaintiff and Dillon (the elevator operator) was a bailment or a sale. The facts showed that on occasions the wheat growers did not want to sell their wheat but wanted to store it. Dillon would accept the wheat for storage, issue scale tickets and mark the ledger with the word "storage" or some abbreviation of it; thereafter if the person who stored the wheat with him wanted it back, he came and got it or a part of it. A few wanting to sow wheat had done this. Apparently the person came in later and sold him the wheat and he paid or settled for it at the market price of that date. Plaintiff in this particular case delivered the wheat with instructions it was to be stored and received a scale ticket. Dillon later shipped this wheat and sold the same to the defendant.

Page 101:

> "This evidence standing alone is hardly sufficient to support a verdict for plaintiff. (See *Bonnett* v. *Shipping Association*, 105 Kan. 121, 181 Pac. 634.) But it cannot be considered as standing alone; it must be considered in the light of pertinent statutes (Laws 1931, ch. 194, R.S., 1933 Supp., 34-223, et seq.) relating to warehouses for the storage of grain for the public. The inspection, grading and storage of grain for the public long has been recognized to be of such importance as to be affected with the public interest and subject to reasonable statutory regulations by state legislation."

Referring to the various statutes of the state at Page 101:

> "This defines a public warehouse to be any elevator or warehouse in the state doing business for compensation, in which grain is stored in such manner that the identity of different lots or parcels cannot

accurately be preserved. The proprietor of such a warehouse, before transacting such business, was required to get a license as a public warehouseman from the state grain inspector."

Page 104:

"The evidence clearly shows—indeed, it is conceded—that Dillon had not complied with the law so as to become a local public warehouseman. He therefore had no right or authority to receive grain for storage or transfer it for the public and to issue warehouse receipts therefor. This is a business the state is regulating by statute, as it has a right to do, since it is a business affected with the public interest. Dillon was not a 'public warehouseman' for the simple reason that he was not 'a person lawfully engaged in the business of storing grain for the public.' Appellee is forced to argue that he did this business unlawfully. To that it is sufficient answer to say the statute forbids that to be done. He could store grain for the public and thus do a public warehouse business only in one way, and that is the way the statute prescribed."

Page 104:

"Generally, it is held that warehouse receipts are invalid when issued by one who had no right or authority to issue such receipts. (*Geilfuss* v. *Corrigan and Another*, 95 Wis. 651, 70 N.W. 306; *The Bell & Coggeshall Co., &c*, v. *Kentucky Glass Works, &c.*, 20 Ky. L. 1089, 48 S.W. 440; *Rodgers* v. *Murray*, (Tex. Civ. App.) 247 S.W. 888; *The Franklin National Bank et al.* v. *Whitehead et al.*, 149 Ind. 560, 49 N.E. 592.)"

Page 105:

"But we are not here dealing with the criminal features of the statute; we are examining the right, power or authority of Dillon to act as a local public warehouseman in the receiving of grain for storage.

and our conclusion on that point is that he had no such power or authority. A purported contract made with one who has no legal power to make it is void. (Restatement, Contracts, Section 18.) Had Dillon issued warehouse receipts to plaintiff for the grain alleged to have been stored with him, such receipts would have been void. His writing the word 'storage' or some abbreviation thereof, on scale tickets, or on his ledger account, did not convert such scale tickets into valid warehouse receipts."

Page 106:

"The evidence discloses Dillon knew he had never complied with the law, and that he was not doing business as a local public warehouseman. Plaintiff, dealing with Dillon, was bound also to know that fact, for the reason that he is bound generally to know the law of the state, and furthermore, had it been a public warehouse the license therefor would have been posted in a conspicuous place in the office room of the elevator. Hence, both of the parties knew that Dillon had no right, power, or authority as a public warehouseman to receive grain for storage or transfer for the public."

Page 107:

"Appellant's contention that appellee is estopped to contend that he stored grain with Dillon is well taken. He knew when he took it there Dillon could not store grain, that he had no legal power or authority to do it; yet he left his grain there under such circumstances that Dillon might mingle it with other grain and handle it as an apparent owner and with the intention, when the price suited him, of going there, taking his tickets, and receiving from Dillon pay for his wheat. We need not quibble over the words whether he planned to 'sell' his wheat at that time, or to 'settle' for it. He did not expect Dillon to handle it in a way to identify it so he could get the same wheat back."

Page 104:

"The statute (Laws 1931, ch. 194) is designed to be a beneficial one. Had Dillon complied with it he could have received plaintiff's grain for storage, and plaintiff would have been protected not alone by Dillon's financial ability but by his bond. The benefits of the statute will result from complying with it; not by ignoring it and rendering it nugatory. Plaintiff could not so deal with Dillon as to aid and abet him in violating it and then reap all the benefits he could have obtained if the statute had been complied with. Dillon had a right to buy grain, and plaintiff to sell to him, on terms of immediate or delayed payment, and at the price the day it was delivered, or some future day. They had no right to make a storage contract. The result is, plaintiff sold his wheat to Dillon; Dillon owed him for it; the title to the wheat passed to Dillon; he could sell it as his own, as he did do to appellant, and when appellant paid Dillon in full for the wheat it owed nothing more either to Dillon or to plaintiff.

From what has been said it is not necessary to discuss other points argued. The judgment of the court below must be reversed with directions to render judgment for appellant."

Schmitz v. *Stockman*, 101 P.2d 962, 151 Kan. 891:

"Syllabus 4. Warehousemen—Rights and Liabilities—Statutory Requirements. A mill or elevator so situated as to be within the purview of G.S. 1935, 34-224, which is not licensed as a warehouse, is without authority to receive grain for storage."

Page 897:

"The milling company was not licensed as a warehouseman; it had no authority to make a contract of storage (*Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P.2d 102)."

Green v. *Fortune*, 151 Kan. 598, 100 P.2d 631:

Page 599:

"It will be noted that wheat was brought to the elevator in June and July, 1934, and this action was commenced January 20, 1938. Plaintiff seeks to avoid the operation of the statute of limitations, G.S. 1935, 60-306, subdivision 2, by arguing that the cause of action did not accrue until May 8, 1937, when he demanded payment of defendants for his wheat. This argument would be persuasive if the contract pleaded were a contract of sale of the wheat at a price to be fixed in the future. We have concluded, however, that the provision in the contract that the elevator company had the option of returning to plaintiff in lieu of a cash payment an equal amount of wheat of like grade and quality, made the relationship between the parties that of bailor and bailee. In other words, the contract pleaded is a storage contract. This elevator and the contract are the type of elevator and contract with which this court dealt in the case of *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P.2d 102. In that case this court held that an elevator such as that described here came under the terms of R.S., 1933 Supp., 34-223, et seq., and that the only business in which such an elevator could engage was the buying and selling of grain. Following the decision in that case, we hold that defendants in this case did not have authority to make a contract such as that described in the petition and the only contract made was one to buy and sell wheat; that the wheat was sold during June and July of 1934 and the cause of action accrued then. It follows that since this case was brought more than three years after the accrual of the cause of action, it was brought too late and cannot be maintained."

Shugar v. *Antrim*, 177 Kan. 70, 276 P.2d 372:

"Syllabus 1. Warehousemen—Statutory Requirements—Failure to Comply—Effect on Rights. One

who operates a grain elevator in this state, on or adjacent to railroad property, but who had not complied with the statute (G.S. 1949, ch. 34, art. 2), so as to become a public warehouseman within the meaning thereof, has no legal right to receive grain for storage, nor authority to issue warehouse receipts therefor, and any grain so received from the grower under such circumstances constitutes a sale of such grain (following *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P.2d 102, 108 A.L.R. 918).

Syllabus 2. Principal and Agent—What Constitutes—Question of Law. The determination of what constitutes agency and whether there is any competent evidence reasonably tending to prove its existence is a question of law.

Syllabus 3. Same — Actions — Burden of Proof. The burden of proof to establish the relationship of principal and agent is on the party asserting it."

Page 71:

"This recent case was action to recover the value of certain wheat delivered by plaintiff farmers to an unlicensed elevator in the city of Galva.

In June and July of 1952, plaintiff delivered wheat to one Antrim whose warehouse license from the state expired May 30 of that year and had not been renewed. Upon delivery of their wheat, plaintiff received scale tickets showing the amount of wheat delivered and marked 'storage' or 'St' leaving their grain in what they apparently assumed was open storage, until April, 1953, when they heard that Antrim had closed his elevator; thereafter actions were brought against Antrim and against the Continental Grain Company, alleging Antrim was the agent for this defendant in purchasing or receiving grain for storage."

Page 74:

"At the outset, it may be stated Antrim Grain Company was not bonded, and had not complied with the statute (G.S. 1949, ch. 34, art. 2) so as to be a public warehouseman at the time of the transactions involved herein, and as a matter of law plaintiffs' delivery of their wheat to Antrim constituted a sale of the grain (*Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P.2d 102; 108 A.L.R. 918; *Schmitz* v. *Stockman*, 151 Kan. 891, 101 P.2d 962; *Greep* v. *Bruns*, supra).

The determination of what constitutes agency and whether there is any competent evidence reasonably tending to prove its existence is a question of law to be determined by the court (*Greep* v. *Bruns*, supra; 1 Mechem on Agency, 2d Ed., 213, section 293). The burden of proof to establish relationship of principal and agent is on the party relying thereon. The law itself raises no presumption of agency, except in a few cases where the law confers authority (*Greep* v. *Bruns*, supra; 1 Mechem on Agency, 2d Ed., 183, Section 255; 2 Am. Jur. 349, Section 442; 3 C.J.S. 252, 253, Section 315)."

The *Fidelity State Bank* v. *Central Surety and Insurance Corp.*, 228 F.2d 654:

"Syllabus 1. Warehousemen. One who accepts receipts from warehouseman which have been issued contrary to statutory requirements, may not be heard to say that he had no notice that there was no compliance with statutes."

Page 657 (3):

"In Kansas, the inspection, grading and storage of grain for the public long has been recognized to be of such importance as to be affected with the public interest, and subject to reasonable statutory regulations by state legislation. *Kipp* v. *Goffe & Carkener*, supra. The provisions of the Act repre-

sent the considered public policy of the state in respect to the matters falling within their compass'. Central States Corporation v. Luther, 215 F.2d 38, 42."

(4, 5):

"The purpose of the Act is to provide a means whereby the public users of warehouse facilities may be protected from loss. If there is compliance with the statute, state officers designated to supervise the enforcement of the Act can check the sales and transfers made by warehousemen and properly protect the public. If transactions like those in this case are upheld, the holders of invalid receipts may make a claim against the bondsman of the warehouseman, and the protection sought to be given those who store grain in warehouses or who purchase valid warehouse receipts, could be destroyed. The examining officials could not effectively inspect and balance the amount of grain held by the warehouseman against outstanding warehouse receipts or other evidences of title to grain issued by the warehouseman. It seems to us that the statutory provisions for obtaining a warehouseman's license and governing transactions relating to grain in storage, either as bailee or owner, were designed to prevent such transaction as occurred between the bank and the grain company and any one participating in such transactions is not entitled to the protection of the Act."

In *Central States Corp.* v. *Luther*, 215 F.2d 38, 42, referring to the above mentioned landmark case in Kansas, the court stated:

"But in *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P.2d 102; 108 A.L.R. 918, it was held that one dealing with a warehouseman who had not been licensed under the act was bound to know that the warehouseman had no right, power, or authority as a public warehouseman to receive grain for storage or transfer for the public; and that one storing grain with such a non-

licensed warehouseman and taking receipts therefor could not invoke the protection of the act."

In view of the above and foregoing, these petitioners respectfully submit that the Circuit Court of Appeals, Tenth Circuit, erred in finding a bailment instead of a completed sale.

In support of the petitioners' contention that no arrangements or relationship could exist in contravention to the law and the public policy of the state, petitioners submit the following:

> "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." *Twining* v. *New Jersey*, 211 U.S. 78, 90-91 (1908). See also *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 679 (1930); *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948); and *Orr* v. *Gilman*, 183 U.S. 278, 283 (1902).

It is elementary law that an illegal contract is void and cannot be enforced (13 C.J.S. 410).

> "The general right to contract is subject to the limitation that the agreement must not be in violation of the Federal or state Constitutions, Federal or state statutes, some ordinance of a city or town, or some rule of the common law. At no time in the history of the common law have agreements in violation of law been regarded as valid. Individuals have never been allowed to stipulate for iniquity. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect. It will not promote in one form that which it declares wrong in another. The whole doctrine relating to illegal agreements is founded on a regard for the public welfare. In fact, it has been asserted that the maintenance of this doctrine is essential to the preservation of the state. It may therefore be said to be a fundamental principle

of the law of contracts that a contract must have a lawful purpose and that transactions in violation of law cannot be made the foundation of a valid contract. Moreover, all agreements are subject to the paramount power of the sovereign." 12 Am. Jur., Contracts, § 148, pp. 642, 643.

"The maxims 'ex turpi causa non oritur actio' and 'ex dolo malo non oritur actio,' founded as they are on sound morals, have for a long time been applied by courts in the practical administration of justice. Under the doctrine expressed in these maxims, it has been said that no court will allow itself to be made the instrument of enforcing obligations alleged to arise out of an agreement or transaction which is illegal. In other words, no action can be based on an illegal agreement. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. It has its foundation in the policy of discouraging illegal and corrupt agreements by refusing all judicial aid to the parties to them. This rule applies to any agreement which is illegal, immoral, or against public policy or prohibited by public law * * *." 12 Am. Jur., Contracts, § 209, pp. 713-715.

Murray v. *Brown*, 177 Kan. 139, 276 P.2d 344:

"Syllabus 1. Trusts—Profit by Trustee. It is a universal rule of law, based upon ethics, morals and sound public policy, that one occupying a fiduciary relationship is not permitted to traffic in the trust estate to his personal profit or advantage.

Syllabus 2. Contracts—When Made in Violation of Law—Effect. No action may be maintained, either at law or in equity, to enforce a contract or agreement made in contravention of law."

At Page 141:

"For the reasons stated the court is of the opinion that the contract pleaded, being contrary to law and public policy, is void and unenforceable (*Bradley* v. *Minor*, 173 Kan. 236, 239, 245 P.2d 1206, 30 A.L.R. 2d 1224)."

Bradley v. *Minor*, 173 Kan. 236, 245 P.2d 1206:

"Syllabus 1. Contracts—When Made in Violation of Law—Effect. A contract made in violation of law is void, and an action to enforce a contract prohibited by statute cannot be maintained.

Syllabus 2. Same—Action for Specific Performance—Contract in Contravention of Law. In an action for the specific performance of a written contract for the sale of real estate and for an accounting of rents and profits because of the alleged wrongful refusal of defendants to convey and surrender possession of the premises, the record is examined and it is *held*: Plaintiffs' evidence affirmatively showed that the purchase price listed in the option agreement was the result of a 'side agreement' between the parties in violation of existing statutes and rules and regulations of the Federal government, thus rendering the agreement void and unenforceable; and further *held*: The demurrer to plaintiffs' evidence should have been sustained."

At Page 239:

"The sum and substance, therefore, of the whole matter is that the option contract, being the result of the side agreement, was in direct contravention of law and unenforceable under the universal rule to the effect that no action can be maintained, either at law or in equity, upon any contract or agreement made in violation of law (*Bourbon County Comm'rs* v. *Miller*, 132 Kan. 52, 294 Pac. 863; *Cook* v. *Donner*, 145 Kan. 674, 66 P.2d 587, 110 A.L.R. 244; *Roddy* v. *Hill*

Packing Co., 156 Kan. 706, 715, 137 P.2d 215; *Murphy* v. *Plains State Bank*, 157 Kan. 530, 142 P.2d 733; and *Brumm* v. *Goodman*, 164 Kan. 281, 188 P.2d 913)."

The warehouse receipts issued under the facts in this case were void and the assignment to Commodity Credit Corporation gave it no greater rights than the farmer-producers had.

> "A bona fide holder of a warehouse receipt acquires the transferor's title to, and constructive possession of, the goods, but he does not acquire any right or title as against one having title to the goods superior to that of the original bailor." 93 C.J.S., § 27, p. 435.

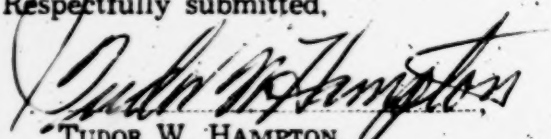
The above and foregoing clearly shows that the law and the public policy of the State of Kansas definitely establishes that a delivery of wheat to an unlicensed elevator or warehouse constitutes a completed sale and transfer of title from the farmer-producers to the warehouseman; that no other agreement or arrangements can be made in contravention of this law and all parties are charged with knowledge of the law and any intent otherwise is immaterial. This being the case, the decision of the Circuit Court of Appeals, Tenth Circuit, is in complete disagreement with and in contravention to the established law and public policy of the State of Kansas, which law is the controlling law under the issues of this case.

> "As this case arose in Kansas where the statutory law of said state is in effect, the law of Kansas is applicable in determining the decision in this case." Erie Rld. Co. v. Tompkins, 304 U.S. 64, 68 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487."

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted

Respectfully submitted,



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APPENDIX

APPENDIX A.

The decision of the Circuit Court of Appeals, Tenth Circuit, entered on October 28, 1959, is as follows:

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6161—SEPTEMBER TERM—1959

TRAVELERS INDEMNITY COMPANY and C. W. SHAFFER, Appellants,
vs.
UNITED STATES OF AMERICA, KENNETH DAY et al., Appellees.

Appeal from the United States District Court for the District of Kansas.

Tudor W. Hampton and Jerry M. Ward, Great Bend, Kansas (Herbert Rohleder, Great Bend, Kansas and Jerry E. Driscoll, Russell, Kansas, were with them on the brief), for Appellants.

Wilbur G. Leonard, United States Attorney, Topeka, Kansas (G. H. Penstone, Attorney in Charge, U.S. Dept. of Agriculture, Kansas City, Missouri, was with him on the brief), for Appellee United States of America; Robert J. Dole, Russell, Kansas, for Appellees Kenneth Day et al.

Before MURRAH, Chief Judge, and PHILLIPS and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

This litigation arose in Kansas when James K. Luder, a grain dealer, ended the 1947 season with insufficient grain to satisfy his outstanding storage obligations. The United States was the owner of warehouse receipts which were issued by Luder and then assigned to the Commodity Credit Corporation by farmers as collateral security for price support loans. This action was brought against Luder's bondsman and all known creditors and holders of grain storage obligations. The complaint sought the appointment of a receiver to preserve Luder's assets, the liquidation of his property, and a determination of the rights of the plaintiff and other creditors.

Luder was the owner and operator of a grain elevator at Dorrance, Kansas, as well as one at Waldo, 25 miles away. The elevator at Dorrance was duly licensed under Kansas law and authorized to accept grain for storage and to issue valid warehouse receipts. The elevator at Waldo was unlicensed and was not used for storage. Luder accepted the delivery of grain from farmers at Waldo, either for purchase or for storage at Dorrance. That which was purchased was disposed of by rail shipment, while the storage grain was transported by truck to the licensed elevator at Dorrance where it was stored.[1] Thereafter,

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1. As to this transfer, Mr. Luder testified:

"Q. Then it was your understanding, and the farmer's understanding—I want to make the record complete—that no time was any of this wheat of the farmers listed by Mr. Hampton, sold? A. No time was it sold.

Q. Then you didn't buy any of it? A. I didn't buy any of it.

warehouse receipts were issued to the producers who requested them. The District Court was of the opinion that it was essential, in order to pass on other issues in the case, to first determine the ownership of the grain which came into the hands of the receiver. By agreement of the interested parties, the testimony of a number of wheat growers who had delivered wheat at Waldo was taken to determine this issue. The trial court found that acceptance of delivery of the grain at Waldo was not a sale and that warehouse receipts issued after the grain was transferred to Dorrance were valid and binding obligations of Luder. We allowed an appeal on this phase of the case as an appeal from an interlocutory order pursuant to Title 28, U.S.C.A., §1292.

As to the material facts, there is no dispute. The elevator at Waldo was known as "Luder Grain Company"; the elevator at Dorrance was called "Dorrance Grain Company". They were both owned by Luder and were operated as a single business. There was but one bank account and one set of books; and all obligations were paid by the Dorrance Grain Company. The grain in question here was produced by sixteen different farmers and deposited with

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Q. Didn't pay for any of it? A. I didn't pay for any of it.

Q. You didn't agree on the price of it? A. No.

Q. And there was enough wheat transferred from the Waldo facility to Dorrance to cover all of the scale tickets that you issued on these particular individuals? A. That's correct.

Q. The effect of the transaction was actually no different than if they would have taken wheat directly to Dorrance and you would have issued a warehouse receipt on it, except that you transferred the wheat there yourself? A. I transferred the wheat.

Q. But your relations with them would have been the same? A. The same.

Q. That applies to at least the 6,600 bushels which was produced by these people listed? A. Yes."

Luder at Waldo, where it was placed in bins used only for wheat accepted for storage, and was then loaded into trucks and transported to Dorrance. The sixteen farmers had no intention of selling the grain to Luder, but understood that he was to transfer the same to his licensed elevator at Dorrance for storage. After the transfer, and while the wheat was in storage, warehouse receipts were issued from the Dorrance elevator when the farmers so requested.[2] At the time the grain was received at Dorrance and when the receipts were issued, the record does not disclose that there was a shortage of wheat there.

The question presented here is whether under Kansas law a grain producer who delivers grain to an unlicensed warehouse as a step in securing its ultimate transfer to a licensed warehouse, thereby makes a sale of the

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2. As to this delivery, the court found:

"3. Prior to November 7, 1957, certain wheat producers delivered 1957 crop wheat to the defendant James K. Luder at Waldo, Kansas. Part of this wheat was purchased immediately by the defendant James K. Luder and deposited in certain bins from which it was resold by the defendant Luder, loaded into rail cars and shipped to terminal elevators. The producers of the balance of such wheat indicated they might want to obtain warehouse receipts so they could get Government price support loans. None of such producers sold or intended to sell their wheat and Luder did not buy or intend to buy their wheat. The elevator at Waldo was used solely as a dumping place for such wheat. Such producers entered into oral contracts with Luder pursuant to which Luder as the agent and employee of each of such producers temporarily placed such wheat in other bins adaptable to the loading of trucks and trucked the wheat to Luder's licensed warehouse at Dorrance, Kansas. The wheat to be trucked to Dorrance was kept separate from the wheat which was purchased. After such wheat was trucked by Luder at his expense to Dorrance from Waldo, part of said wheat was sold to James K. Luder. James K. Luder then issued warehouse receipts on his Dorrance warehouse to the producers of most of the remainder of such wheat. Warehouse receipts representing 6,612.95 bushels of such wheat were thereafter negotiated to Commodity Credit Corporation, a wholly owned agency of the United States, as collateral security for price support loans. * * *"

grain, irrespective of his intent or the intent of the warehouseman, and so loses his title by operation of law, even though the grain is transferred as intended. We agree with the trial court that the transaction resulted in a bailment and title remained with the grower.

Relying on *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P.2d 102, 108 A.L.R. 918, and the Kansas cases which follow,[3] the appellants contend that the trial court's findings and conclusions are erroneous. The Kipp case is distinguishable on the facts, and not applicable. There the elevator operator had not attempted to comply with the Act so as to bring himself within its provisions, and no license was issued to him. See *Hartford Accident and Indem. Co.* v. *Kansas*, 10 Cir., 247 F.2d 315. In addition, there was absent the fact of warehouse receipts being issued for the grain after its arrival in a licensed warehouse. Here the evidence is without conflict that the grain of these sixteen farmers, although deposited at Waldo at an unlicensed elevator, was received only as a part of a transaction which the parties contemplated would include the transfer of the grain to the licensed elevator at Dorrance where warehouse receipts then would be issued. As stated in the Kipp case, the handling and storage of grain for the public in warehouses is "recognized to be of such importance as to be affected with the public interest, and subject to reasonable statutory regulations * * *." The statutory regulations of Kansas place strict requirements on those engaged in such business, including the furnishing of bonds conditioned upon compliance with those requirements. Clearly the purpose of the statute is to protect the public, including farmers who store their grain in warehouse facilities. To

3. These cases are: *Shugar* v. *Antrim*, 177 Kan. 70, 276 P.2d 372; *Schmitz* v. *Stockman*, 151 Kan. 891, 101 P.2d 962; and *Green* v. *Fortune*, 151 Kan. 598, 100 P.2d 631.

hold as contended for by the appellants would be directly contrary to this purpose. It would provide a method whereby an innocent grain owner would lose title to his product even though it was stored in a licensed warehouse as the parties intended it ultimately should be. We are of the opinion that a reasonable interpretation of the Kansas statute is that if a licensed warehouseman takes possession of an owner's grain at a place other than a licensed warehouse and, in compliance with an agreement of the parties that grain later is actually transferred to and stored in his licensed warehouse, the owner does not lose title and valid warehouse receipts or other evidence of ownership may be issued.[4]

Affirmed.

The findings of fact and conclusions of law of the United States District Court for the District of Kansas, is as follows:

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4. In *Hartford Accident and Indem. Co.* v. *Kansas*, 247 P.2d 315, we said that the Kansas Warehouse Act "contemplates that the relationship of a warehouseman and depositors of grain may exist even though no statutory warehouse receipt was issued . . ."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff, v. JAMES K. LUDER, individually and d/b/a DORRANCE GRAIN COMPANY, Dorrance, Kansas, and LUDER GRAIN COMPANY, Waldo, Kansas, et al., Defendants.	Civil Action No. T-1778

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the above entitled action, the Court, being informed that it is essential for the orderly determination of other issues first to determine the ownership of certain of the grain which came into the hands of the receiver, and being further informed that the rights of certain grain producers to price support under Federal Government Price Support Programs may be lost unless there is a speedy decision as to the title to such grain, finds that it is essential that the question of the ownership of such grain be decided in advance of the other issues in this action, and after hearing evidence and being fully advised in the premises with respect to the issue of whether or not certain wheat and milo deposited with the defendant, James K. Luder, remained the property of the producers who deposited such grain, or was sold to the defendant, James K. Luder, so that it became a part of the assets of the receivership estate, makes the following findings of fact and conclusions of law:

Findings of Fact.

1. The defendant, James K. Luder, at all times material to this action and prior to the appointment of a receiver by the District Court of Russell County, Kansas, on November 7, 1957, was operating two grain warehouses, one a warehouse at Waldo, Kansas, which was not licensed by the State of Kansas, and the other a warehouse at Dorrance, Kansas, which was licensed by the State of Kansas.

2. The Travelers Indemnity Company of Hartford, Connecticut, is the surety on James K. Luder's warehouse bond covering the operations at the licensed warehouse at Dorrance, Kansas; C. W. Shaffer is indemnitor on said bond; and the Travelers Indemnity Company of Hartford, Connecticut, is surety on the bond on Edward Marion Betts, an employee of James K. Luder, covering operations at the licensed warehouse at Dorrance.

3. Prior to November 7, 1957, certain wheat producers delivered 1957 crop wheat to the defendant James K. Luder at Waldo, Kansas. Part of this wheat was purchased immediately by the defendant James K. Luder and deposited in certain bins from which it was resold by the defendant Luder, loaded into rail cars and shipped to terminal elevators. The producers of the balance of such wheat indicated they might want to obtain warehouse receipts so they could get Government price support loans. None of such producers sold or intended to sell their wheat and Luder did not buy or intend to buy their wheat. The elevator at Waldo was used solely as a dumping place for such wheat. Such producers entered into oral contracts with Luder pursuant to which Luder as the agent and employee of each of such producers temporarily placed such wheat in other bins adaptable to the loading of trucks and trucked the wheat to Luder's licensed warehouse at

Dorrance, Kansas. The wheat to be trucked to Dorrance was kept separate from the wheat which was purchased. After such wheat was trucked by Luder at his expense to Dorrance from Waldo, part of said wheat was sold to James K. Luder. James K. Luder then issued warehouse receipts on his Dorrance warehouse to the producers of most of the remainder of such wheat. Warehouse receipts representing 6,612.95 bushels of such wheat were thereafter negotiated to Commodity Credit Corporation, a wholly owned agency of the United States, as collateral security for price support loans. At the time of obtaining such loans each of such producers executed a "Producer's Note and Loan Agreement" which provided in part as follows:

> "For the purpose of obtaining the loan evidenced by the producer's note, the producer * * * represents and warrants to and agrees with all holders of the note as follows * * * That he is the owner of the pledged commodity and has the legal right to pledge the same."

The warehouse receipts so issued as aforesaid were negotiated to Commodity Credit Corporation by the following producers for the following quantities of wheat:

Warehouse Receipt No.	Name of Producer	Quantity of Wheat
64	Kenneth Day	1142.17 bushels
67	Claud McKnight	684.00 "
69	Lester Paget	541.33 "
70	Lester Paget	198.83 "
71	Robert Paget	361.83 "
72	Thornton Bros.	352.33 "
73	Everett Pruter	447.83 "
74	Reynolds Bros.	525.00 "
75	Harold Lund & Iva Bradshaw	385.00 "
76	Richard Branda	531.96 "

78	Gillett Bros.	610.17	"
80	R. E. Paget	291.50	"
81	Mrs. Ed (Lydia) Harris	202.00	"
86	Thomas Joe Hutchinson, Jr., Executor Earl Clemmons Estate	100.00	"
87	Thomas J. Hutchinson, Jr.	100.00	"
88	Dale Beatty	139.00	"
		6612.95	

Commodity Credit Corporation has now become the owner of the above warehouse receipts.

In addition to the above warehouse receipts which were negotiated to Commodity Credit Corporation, warehouse receipts representing 1957 crop wheat delivered to Luder at Waldo and trucked to Dorrance were issued to and are now held by the following producers for the following quantities of wheat:

Warehouse Receipt No.	Name of Producer	Quantity of Wheat
82	Russell Ehrlich	127.33 bushels
85	V. M. Rogers, Administrator for Ruby Maupin and Pearl Schulte Estates	114.50 "

Certain other producers delivered 1957 crop wheat under oral contracts identical to those entered into between Luder and the producers above listed to the defendant Luder at Waldo, which was trucked to Dorrance, did not obtain warehouse receipts, and still hold scale tickets issued by the defendant Luder. The names of such producers and the quantity of wheat represented by their scale tickets are as follows:

Name of Producer	Quantity
1. Neva Mitchell	191.00 bushels
2. Alma Roe	333.83 "
3. Elvin Van Pelt	1517.30 "
4. Robert Lund and Walter Lund, d/b/a Lund Brothers	9.20 "
5. Robert Lund and Walter Lund, d/b/a Lund Brothers, 2/3 share of Lund-Mitchell	383.20 "
6. Robert Lund and Walter Lund, d/b/a Lund Brothers, 2/3 share of Lund Brothers	240.20 "

The said wheat delivered by the above named producers or any part thereof was not delivered to James K. Luder in the ordinary or usual course of his business but only with the understanding that each of the above named producers respectively would retain title and all beneficial interest in and to the said wheat so delivered by each of them with the exclusive right to sell, mortgage, pledge or otherwise dispose of same.

All other producers of wheat delivered to Luder at Waldo, Kansas, sold said wheat at the time of delivery thereof.

4. The defendants Lewis Anschutz and Jake Herbel delivered to the defendant Luder at Dorrance, Kansas, 171.17 and 220 bushels respectively of wheat and were issued in exchange therefor warehouse receipts numbered respectively 65 and 77. Each of these producers executed a "Producers Note and Loan Agreement" with Commodity Credit Corporation and obtained a Government price support loan and as collateral security therefor negotiated their warehouse receipts to Commodity Credit Corporation and Commodity Credit Corporation has now become the owner

of such warehouse receipts. It is undisputed that in addition to the above listed warehouse receipts representing wheat of the 1957 crop negotiated to Commodity Credit Corporation, Commodity Credit Corporation also holds warehouse receipts for 66,150.67 bushles of wheat representing wheat of earlier crop years delivered to the defendant Luder at Dorrance. On January 25, 1957, Commodity Credit Corporation issued a loading order to James K. Luder for the sum of 9,789.50 bushels of wheat. Luder shipped only 9,546.67 bushels leaving unshipped a balance of 242.83 bushels.

The defendants Ross Van Landingham and Norris Nelson delivered to the defendant Luder at Dorrance, Kansas, 2,472.50 bushels and 569.50 bushels respectively of wheat and were issued as evidence thereof warehouse receipts numbers 66 and 63 respectively. Said defendants likewise negotiated price support loans with Commodity Credit Corporation and pledged their warehouse receipts to Commodity Credit Corporation but said defendants later repaid their loans, redeemed their warehouse receipts from Commodity Credit Corporation and were issued checks by the defendant Luder in payment for the value of the wheat. The check issued to Norris Nelson was not honored because of the fact that the defendant Luder did not have sufficient funds in his bank account to pay such checks. The check issued to the defendant, Ross Van Landingham, did clear, and defendant, Ross Van Landingham, obtained payment from Luder for his wheat. The defendant, Luder, having regained possession of said receipt, then pledged it to the Home State Bank as collateral security for a loan, and said warehouse receipt No. 66 is now in possession of the Home State Bank.

5. During the period of time from September 1, 1957, to and including November 7, 1957, approximately 3,812,240

pounds of milo were received by James K. Luder at Waldo, Kansas. Said milo was of high moisture content. The cash price of milo at that time was substantially lower than the government price support rate. Said milo was delivered by producers and received by James K. Luder with the oral understanding and agreement that Luder would dry said grain and load it, if possible, for shipment to a terminal warehouse for storage; that if no terminal storage could be obtained the producers had the right to have their milo returned.

In drying and loading said grain for shipment Luder was to act solely as the agent of the respective producers. Said producers did not sell or intend to sell said milo to Luder and Luder did not buy or intend to buy such milo.

The said milo, or any part thereof, was not delivered to James K. Luder in the ordinary or usual course of his business, but only with the understanding that each of the producers respectively would retain title and all beneficial interest in and to said milo so delivered by each of them, with the exclusive right to sell, mortgage or pledge the same, thereby enabling each of said producers to obtain warehouse receipts on the basis of which the producers could obtain Government price support loans.

The names of the producers who delivered milo at Waldo pursuant to such oral contracts and the quantities of milo which they delivered are as follows:

Name of Producer	Quantity
1. Julian Boyd	47,520 pounds
2. H. B. Brown	23,760 "
3. Ralph P. Beatty	40,060 "
4. Hazel Beatty	20,060 "
5. N. E. Wilson	10,450 "

6.	Anna Windholz	15,000	"
7.	Jerome Windholz	30,000	"
8.	Elvis Elliott	11,700	"
9.	J. T. Harrell	5,850	"
10.	Boyd & Boyd	27,750	"
11.	N. L. Luhman	12,420	"
12.	John Fisher	14,030	"
13.	Dewey Amos	7,010	"
14.	Weldon Branda	6,650	"
15.	Wallace Estate, V. M. Rogers, Trustee	3,220	"
16.	Lee Thompson	30,050	"
17.	Fred D. Herman	16,350	"
18.	Roy McClain & Dave Merchant	25,500	"
19.	Frank Marvinec	156,620	"
20.	Raymond Caprez	22,210	"
21.	Finch-Lundy-Miller	35,410	"
22.	Alex & Tom Hampl	20,250	"
23.	Clarence Hrabe & S. J. Coolbaugh	16,090	"
24.	R. E. Keller	19,850	"
25.	Glen A. & Letitia Luder	32,900	"
26.	R. W. Lake	70,280	"
27.	Ruy O. Miller	35,140	"
28.	Miller-Finch-Kress	41,350	"
29.	Laurence Nelson	58,810	"
30.	Avery Post	9,110	"
31.	Chet Rounkles	52,590	"
32.	Paul & Herbert Hachmaster	77,460	"
33.	Ralph Bolby	38,730	"
34.	Alfred Naylor	39,340	"
35.	Emmett Dutt	18,050	"
36.	Emmett Dutt	55,440	"
37.	Henry G. Schloh	27,720	"
38.	C. V. Fink	13,250	"
39.	L. H. and Henry Koelling	27,730	"

40.	Jacob Bean	8,480	"
41.	Everett Beisner and Jessie Hackerott	48,080	"
42.	J. W. Loreno	20,740	"
43.	Fay Reitmel	32,540	"
44.	Fidilis Windholz and Anna Windholz	51,490	"
45.	Lloyd Thompson and J. T. Harrell	51,990	"
46.	W. J. Palmer and John B. Luder	52,760	"
47.	John Wallace and Wallace Estate	29,550	"
48.	B. C. Clark	25,840	"
49.	Laurin Ewing	90,390	"
50.	R. C. Schultz	112,540	"
51.	E. A. Simons	113,980	"
52.	L. R. Brown	70,910	"
53.	Freddie and Robert Boxberger	53,900	"
54.	Fred W. Boxberger	29,450	"
55.	Leo Zeigler	187,690	"
56.	Lloyd Witt	100,870	"
57.	Dean Erway	63,260	"
58.	Dick Rogers	114,500	"
59.	Minnie Crawford	57,250	"
60.	Paul Hrabe	84,400	"
61.	Arthur Tatkenhorst	39,170	"
62.	L. E. and F. E. Murphy	72,500	"
63.	Jake Anschutz	21,470	"
64.	Fred C. Herman	56,620	"
65.	Bill Funk	66,000	"
66.	Roy Markey and Peck	85,110	"
67.	Clay Brown	5,980	"
68.	Gene Smith	58,960	"
69.	Gene Smith and Grill	19,560	"
70.	Dale Beatty and Gene Mullender	41,720	"
71.	W. J. Palmer and R. E. Keller	15,290	"
72.	Lloyd Thompson and Ogden Greene	39,060	"
73.	Bertha Cochran and Delbert Cochran	16,460	"

74.	Katie Wineland	11,900	"
75.	Al Becker	87,710	"
76.	Julian Boyd and Brown Estate	54,200	"
77.	Carl Luhman and Kertz	78,730	"
78.	Henry Luhman	11,470	"
79.	Ray Caprez and Caprez Estate	29,480	"
80.	Howard Kornmeyer and Elizabeth Jones	35,130	"
81.	Henry Luhman-Son.	41,110	"
82.	Francis Wirth and Fred Good	44,060	"
83.	Lee Warnack	37,520	"
84.	E. G. Whitman	12,740	"
85.	Bill Hrabe and Mrs. Fern Spear	29,230	"
86.	Henry Traynor	7,900	"
87.	Jack and Dale Heich	11,390	"
88.	Rex Boyd and Mrs. Ora Erway	11,620	"
89.	Fidilis Windholz and Jessie Lesher	10,140	"
90.	Godfred Miller and Paul Dunler	12,000	"
91.	Delbert Cochran and Ralph Bean, Exec. of Rudolph Bean Estate	3,360	"
92.	Bryon Stewart	3,990	"
93.	Karl Maier and Margaret L. Cook	6,770	"
94.	Harold Lund	8,270	"
95.	Anery Robinson	2,300	"
96.	Harold Mellard Estate by Gay Michaelis, Ad.	9,500	"
97.	Wilson Nelson	1,770	"
98.	Russ Boyd	6,280	"
99.	Everett Griffin	11,780	"
100.	Amos Johnson	9,500	"
101.	Clarence and J. J. Hrabe	46,740	"

6. That approximately 318,020 pounds of milo was received in the fall of 1957 by the defendant James K. Luder at his licensed warehouse at Dorrance prior to November 7, 1957. The milo producers contracted with

James K. Luder to dry their grain and ship same for the producers to terminal elevators for storage for the purpose of enabling the producers to obtain warehouse receipts. The names of the producers who delivered milo at Dorrance pursuant to such oral contracts and the quantities of milo which they delivered are as follows:

Name of Producer	Quantity
1. Willis Anschutz	73,110 pounds
2. Art Heffel	17,690 "
3. Ernest F. Schuber	8,850 "
4. Fred Kaufman	25,070 "
5. W. H. Kaufman	18,400 "
6. Fred Kaufman	18,400 "
7. Art Heffel	8,660 "
8. D. D. Beisel	4,330 "
9. E. E. Anderson	44,980 "
10. Edwin Small	13,870 "
11. Lola Morton	6,700 "
12. Vaughn Humes	56,450 "
13. Anna Miller	1,910 "
14. E. E. Anderson	8,920 "
15. Lorraine Mills	4,600 "
16. Lewis G. Anschutz	4,280 "
17. Charles Stoppel	2,140 "

7. That on November 7, 1957, James K. Luder, doing business as the Dorrance Grain Company, Dorrance, Kansas, and Luder Grain Company, Waldo, Kansas, was placed in Receivership in the District Court of Russell County, Kansas, and Ralph P. Beatty was appointed temporary receiver in said action and ordered by the court to use all reasonable means and procedures to properly care for, preserve and to prevent spoilage or deterioration of any and all grain located in any of the storage facilities owned, leased or operated by James K. Luder.

Luder, prior to the appointment of said receiver cleaned, dried and shipped approximately one-third (1/3) of the milo from Waldo, and the state receiver, Ralph P. Beatty, pursuant to the order of his appointment, cleaned, dried and shipped the remaining two-thirds (2/3) of the milo at Waldo, and all the milo from Dorrance. Said shipments were made to Wright-Lorenz Grain Company, Salina, Kansas, who received and now holds 318,020 pounds of milo from Dorrance and 3,312,420 pounds of milo from Waldo.

8. The United States did not make any price support loans on milo delivered during the fall of 1957 to Luder's warehouse at either Waldo or Dorrance since the receiver was appointed to take charge of the assets of the defendant Luder before any of said producers obtained warehouse receipts for such milo.

9. Thereafter, after receipt of the grain involved in this action, James K. Luder, d/b/a Luder Grain Company, Waldo, Kansas, and Dorrance Grain Company, Dorrance, Kansas, was found to have insufficient wheat in his warehouse at Dorrance to cover his outstanding storage liability and to be insolvent, and pursuant to this action instituted by the United States, Richard M. Driscoll, Russell, Kansas, was on November 19, 1957, appointed Federal Receiver in said action by the court to liquidate the assets of James K. Luder, individually, and d/b/a Luder Grain Company, Waldo, Kansas, and Dorrance Grain Company Dorrance, Kansas; and pursuant to the order of this Court said Receiver sold the wheat which was in the warehouse at Dorrance, and is now holding the proceeds therefrom for distribution among the holders of the storage obligations found by the court to be entitled to share in such proceeds, and said Receiver is likewise, endeavoring to liquidate the other assets of James K. Luder; and said Re-

ceiver inventoried the milo delivered by the Producers to the Waldo and the Dorrance houses in said action.

10. That thereafter, in order to preserve such rights as the farmers or grain producers might have to price support on the milo involved in this litigation, the United States did enter into purchase agreements with many of such producers, which purchase agreements give to the producers the option to deliver the milo to Commodity Credit Corporation at the price support rate, provided they can deliver to the Government good title to such milo.

11. The total quantity of milo delivered to the defendant Luder by the producers at Dorrance is 335,574 pounds. As a result of the cleaning, drying and shipment of such milo to a terminal elevator, shrinkage has resulted. The total amount of which shrinkage is 17,584 pounds.

12. The total quantity of milo delivered to the defendant Luder by the producers at Waldo is 3,983,870 pounds. As a result of the cleaning, drying and shipment of such milo to a terminal elevator, shrinkage has resulted. The total amount of which shrinkage is 171,450 pounds.

13. Additional items of expense applicable to the shipments of milo from Waldo and Dorrance include drying, cleaning, and loading performed by Luder and the receiver, Ralph P. Beatty, and charges for freight, handling, inspection, commission, interest and storage incurred by Richard M. Driscoll, Federal Receiver and Wright-Lorenz Grain Company. Storage charges continue to accrue daily.

Conclusions of Law.

1. The oral agreements described in finding of fact No. 3 providing that Luder should receive the wheat of producers named in such finding of fact at Waldo and

truck it at his expense to Dorrance were valid and binding oral agreements and Luder, under the terms of such agreements, was an agent and employee of the producers concerned in receiving such wheat and trucking it to Dorrance. When the quantities of wheat provided for in such oral agreements were deposited in Luder's warehouse at Dorrance, valid and enforceable storage obligations were created pursuant to which Luder held in storage for such producers the quantities of wheat evidenced by the scale tickets issued to such producers. The warehouse receipts subsequently issued to such producers were valid and binding storage obligations of the defendant Luder. Such oral agreements for the receipt and transportation of the wheat to Dorrance have been duly and lawfully performed.

The negotiation and transfer of the receipts issued by Luder to the defendants Kenneth Day, Claud McKnight, Lester Paget, Robert Paget, Thornton Bros., Everett Prute., Reynolds Bros., Harold Lund & Iva Bradshaw, Richard Branda, Gillett Bros., R. E. Paget, Mrs. Ed. (Lydia) Harris, Thomas Joe Hutchinson, Jr., Executor of Earl Clemmons Estate, Thomas J. Hutchinson, Jr., and Dale Beatty, to Commodity Credit Corporation was a legal and valid transfer of title to the wheat represented by such warehouse receipts.

The present holders of the warehouse receipts and scale tickets listed in finding of fact No. 3 are entitled to share pro rata in the proceeds from the sale of Richard M. Driscoll of the wheat which came into his possession as receiver.

2. The negotiation and transfer of the receipts issued by Luder to the defendants Louis Anschutz and Jake Herbel to Commodity Credit Corporation, was a legal and valid transfer of title to the wheat represented by such warehouse receipts. The present holders of the warehouse

receipts, including Norris Nelson, representing the wheat referred to in finding of fact No. 4 which was delivered to the defendant Luder at Dorrance are also entitled to share pro rata in the proceeds of the sale of the wheat which came into the possession of the receiver except that warehouse receipt number 66 issued to Ross Van Landingham and now held by the Home State Bank in the amount of 2473.50 bushels, is not a valid outstanding storage obligation and is not entitled to share in the proceeds delivered from the sale of such wheat.

The unshipped balance of 242.83 bushels of wheat which the defendant James K. Luder failed to ship on the Commodity Credit Corporation loading order dated January 25, 1957, is also a valid storage obligation of the defendant and entitled to equal credit with the warehouse receipts and scale tickets in computing the pro rata share of the United States from the proceeds of the sale of the wheat by Richard M. Driscoll.

3. The oral agreements referred to in finding of fact No. 5, pursuant to which the producers named therein delivered to the defendant Luder at Waldo after shrinkage and handling losses, 3,312,420 pounds of milo, and the oral agreements referred to in finding of fact No. 6, pursuant to which the producers named therein delivered to the defendant Luder at Dorrance after shrinkage and handling losses, 318,020 pounds of milo, are valid and binding oral agreements pursuant to which the defendant Luder and subsequently the receiver appointed by the Kansas District Court, Ralph P. Beatty as agents of such producers received, dried, cleaned, and shipped such milo to the defendant Wright-Lorenz Grain Company at Salina, Kansas, for storage in terminal elevators. Such oral agreements have been duly performed by the parties thereto. The title in and to all of the milo delivered to Luder's two facilities pursuant to such oral agreements is vested in the

producers who delivered such milo as their respective interests may appear in findings of fact No. 5 and No. 6; and the Wright-Lorenz Grain Company in cooperation with Richard M. Driscoll, receiver in this action, is authorized and directed to issue or cause to be issued warehouse receipts representing such milo to the producers entitled thereto. Each warehouse receipt shall be charged with its pro rata share of the shrinkage resulting from the cleaning, drying, loading and shipment of such milo and the receipts to be issued shall be subject to liens for unpaid amounts due for drying, cleaning and loading services performed by Luder or Ralph P. Beatty and for the freight charges for the shipment of such milo and for warehouse charges for receiving, drying, loading and storing such milo and for all such charges set forth in findings of fact No. 13. Any producer who does not desire to obtain a warehouse receipt shall be entitled to have his pro rata share of the milo as set out in findings of fact No. 5 and No. 6, delivered to him or he shall be permitted to sell it subject to him bearing his pro rata share of the shrinkage and charges above referred to and subject to the liens above referred to.

4. All wheat and milo delivered to Luder by producers not listed in findings of fact No. 3, No. 4, No. 5 and No. 6 was sold to Luder, and the producers thereof have no interest in the proceeds from the sale of the wheat stored at Dorrance or in the milo shipped to terminal warehouses.

Pursuant to the provisions of 28 U.S.C. 1292, the Court makes this additional finding:

This order involves controlling questions of law in this case and there is substantial ground for difference of opinion and that an appeal from the order may materially advance the ultimate termination of the litigation.

(Signed) Delmas G. Hill
Chief Judge.

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No. 660

In the Supreme Court of the United States

October Term, 1949

TRAVELERS INSURANCE COMPANY AND C. W. SEATON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinion was filed by the district court. The opinion of the Court of Appeals (Pet. App. A1–A6) is reported at 271 F. 2d 521.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1959. The petition for a writ of certiorari was filed on January 26, 1960. The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. 1292(b) (Pet. App. A3) and the jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts as found by the district court, and under Kansas law, there arose the relationship of bailor-bailee between the producers of wheat and a warehouseman where wheat was delivered to an unlicensed warehouse for transfer to, and storage in, a licensed warehouse operated by the same warehouseman.

STATEMENT OF THE CASE

In 1957, James K. Luder, d/b/a Dorrance Grain Company, operated at Dorrance, Kansas, a public grain warehouse licensed by the State of Kansas. In addition to the licensed warehouse, Luder also operated an unlicensed warehouse at Waldo, Kansas. In 1957, 16 warehouse receipts, representing 6,612.95 bushels of 1957 crop wheat, were drawn on the Dorrance warehouse and issued to 16 producers of wheat. The receipts were subsequently pledged to the Commodity Credit Corporation as collateral security for price support loans (Pet. App. A8–A9).

In November 1957, it was determined that Luder did not have sufficient grain in his warehouse at Dorrance to satisfy his outstanding storage obligations and that he was insolvent (Pet. App. A18). The United States, on behalf of the Commodity Credit Corporation, brought suit to have a receiver appointed, to obtain a determination of the rights of the United States and other holders of storage obligations, and to have a distribution of the wheat, or the proceeds, on hand at the Dorrance warehouse. The petition, in addition to Luder and other holders of storage obligations, named as defendants the Trav-

elers Indemnity Company, the surety on Luder's warehouse bond, and C. W. Shaffer, indemnitor, and sought a judgment against the surety to the extent that the grain in Luder's warehouse was insufficient to satisfy his storage obligations.

In the proceedings in the district court the surety questioned whether the warehouse receipts pledged to Commodity were valid storage obligations of the warehouseman since the grain represented by the warehouse receipts was delivered by the producers to Luder's unlicensed warehouse at Waldo, Kansas, and from there transferred by the warehouseman to the warehouse at Dorrance, Kansas.

In interlocutory findings, conclusions and an order the district court found (Pet. App. A11) that the wheat was delivered by the producers with the understanding that each producer would retain title to, and all beneficial interest in, the wheat delivered by them with the exclusive right to sell, mortgage, pledge or otherwise dispose of the wheat. It was found (Pet. App. A8) that none of the producers sold or intended to sell their wheat and Luder did not intend to buy their wheat; that the elevator at Waldo was used solely as a place for receipt of the wheat intended for storage by the producers and that the producers entered into oral contracts with Luder pursuant to which Luder as the agent and employee of the producers was to truck the wheat to Luder's licensed warehouse at Dorrance, Kansas (Pet. App. A19–A20). It was further found that the wheat to be trucked to Dorrance was to be kept separate from wheat purchased by Luder at the Waldo ele-

vator, and that, after the wheat had been trucked to Dorrance, Luder then issued warehouse receipts on his Dorrance warehouse (Pet. App. A8–A9). On these facts, the district court concluded that when the producers' wheat was desposited in the Dorrance warehouse and warehouse receipts were issued, valid and enforcible storage obligations were created (Pet. App. A20).[1]

On appeal by the surety, under 28 U.S.C. 1292(b), the Court of Appeals affirmed. The court agreed with the trial court that the transaction between the warehouseman and the producers resulted in a bailment and that the title to the wheat remained with the producers (Pet. App. A5). The court held, contrary to the surety's contention, that nothing in the statutes or decisions of the State of Kansas required that the transactions between the producers and Luder be treated as sales rather than valid storage agreements.

ARGUMENT

There is no occasion for this Court to review the decision below. On uncontradicted testimony, both the district court and the Court of Appeals have found and concluded that the transactions between the wheat producers and the warehouseman gave rise to a bailor-bailee relationship and that the warehouse receipts negotiated to the Commodity Credit Corporation represent valid storage obligations of the warehouseman. Short of exceptional error, not even

[1] The court in its interlocutory order (Pet. App. A10–A18) made additional determinations not material to the surety's appeal or to the petition in this Court.

arguably present here, the concurrent findings of fact of the courts below should be deemed conclusive in this Court. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51; *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

Petitioners' argument (Pet. App. 9) that, as a matter of Kansas law, the transactions between producers and Luder must be deemed a "completed sale" of the grain is without merit. *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P. 2d 102, on which petitioners rest their argument, "is distinguishable on the facts, and not applicable" (Pet. App. A5). The *Kipp* case was an action for conversion by a producer of grain against a third party who purchased or otherwise acquired, from an unlicensed warehouseman, grain produced by the plaintiff. The evidence in the case "was open to the construction that plaintiff took his wheat to the [unlicensed] elevator without any intention of having it returned to him, or exercising any control over it, but with the intention of taking his scale tickets to the elevator when the price suited him and receiving pay for it." 144 Kan. at 106. The Kansas court concluded that the transaction was a sale, not a bailment.

The facts in the *Kipp* case and this case differ in essential respects. Here, both the producers and the warehouseman confirmed, and the district court found (Pet. App. A11), that the grain in question was delivered to the warehouseman with the understanding that the producers "would retain title and all beneficial interest in and to the said wheat * * * with the exclusive right to sell, mortgage, pledge, or otherwise dispose

of same" (Pet. App. A11); furthermore, as the trial court found, "[n]one of the producers sold or intended to sell their wheat and Luder [the warehouseman] did not buy or intend to buy their wheat" (App. A8). A still further distinguishing feature is that in *Kipp* the transaction was between a producer and an *unlicensed* warehouseman. Here, Luder was duly licensed under Kansas law to operate a grain warehouse at Dorrance, Kansas, and the warehouse receipts issued by Luder and negotiated to Commodity were drawn on the Dorrance house after the grain was trucked there by the warehouseman, as the producers' agent (Pet. App. A8–A9), from the unlicensed facility at Waldo, Kansas, which was used solely as a dumping place for wheat intended for storage (Pet. App. A8).

In the light of the facts of this case and the question involved, the other authorities relied upon by petitioners (Pet. 13–21) fail to demonstrate any error in the decisions below. And the same is true of the Kansas warehousing statute quoted by petitioners (Pet. 4–7). As stated by the Court of Appeals: "Clearly, the purpose of the [Kansas] statute is to protect the public, including farmers who store their grain in warehouse facilities. To hold, as contended for by appellants, would be directly contrary to this purpose. It would provide a method whereby an innocent grain owner would lose title to his product even though it was stored in a licensed warehouse as the parties intended it ultimately should be" (Pet. App. A5–A6). Moreover, the fact that both courts below have jurisdiction of cases arising in the

State of Kansas, and are constantly dealing with issues of Kansas law, make it even more probable that Kansas law was correctly applied to the facts of this case. See *Propper* v. *Clark*, 337 U.S. 472, 486–7; *Estate of Spiegel* v. *Comm'r.*, 335 U.S. 701, 707–8.

CONCLUSION

The decision of the Court of Appeals is clearly correct. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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